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Supreme Court of the United States

OCTOBER TERM, 1958

No. 993

EDWIN K. ATWOOD, ALICE B. ATWOOD, RUTH P. FISHER and THOMAS H. FISHER,

Petitioners.

—against—

GILBERT KERLIN,

Respondent.

BRIEF OPPOSING CERTIORARI

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Question Presented

Respondent disagrees, completely, with the Petitioners' statement of the Questions Presented for Review (Pet. p. 3) and respectfully submits that the Petition presents, in fact, only the following Question:

(1) Where the rights of the parties in and to certain lands in Texas, have, after extensive litigation there, been fixed and determined by a final judgment of the Texas courts (through the Supreme Court of that State)—

May Petitioners, who were adverse parties in the Texas action and who disagree with the result reached there—demand, as a matter of Constitutional right—a retrial of all of their contentions, in a suit in equity

brought in another jurisdiction (the Southern District of New York)—or may the latter Court determine Petitioners' rights by a summary judgment, where whatever rights Petitioners have, are fixed and determined by: the Texas judgment; two written oil leases (both filed of record in Texas); and other indisputable and undisputed documentary evidence?

Statement

Honorable Sylvester J. Ryan, before whom this case had appeared on several previous occasions (Pet. Appdx. II, 11a), was thoroughly familiar with the questions it presented before he granted the summary judgment from which Petitioners appeal.

This action relates to the rights of the parties in certain Texas lands. It was commenced January 18, 1951, in the District Court. After a flurry of unsuccessful activity by Petitioners in the District Court and the Court of Appeals, Second Circuit (Pet. Appdx. I, 2a; Appdx. II, 11a, 12a), the case lay dormant, pending the trial and determination of a Texas action between the same parties (Pet. Appdx. I, 2a). The Texas action involved much the same subject matter, and was appealed to the Supreme Court of Texas (*Fisher, et al.* v. *Kerlin*, 279 S. W. 2d 637 [Texas Civ. App. 1955, rehearing and leave to appeal both denied]).

Finally, after the rights of the parties in and to the Texas lands and their respective oil, gas and other mineral interests therein, had been adjudicated by the Texas courts, Judge Ryan, of the Southern District of New York, on the basis of that Texas

judgment and other *undisputed documentary evidence*, granted a summary judgment herein: settling Respondent's account; dismissing Petitioners' Supplemental Complaint; and denying Petitioners leave to amend their Supplemental Complaint by adding two additional counts, Six and Seven, thereto.

In support of this disposition of Petitioners' case, Judge Ryan handed down a carefully detailed opinion in which he disposed of each of Petitioners' contentions (*Atwood, et al* v. *Kerlin*, 169 F. S. 135 [S. D. N. Y. 1957] (Pet. Appdx. II, 10a-22a). The Court of Appeals for the Second Circuit affirmed Judge Ryan's disposition of the case, with a unanimous opinion, which fully supports the decision of the District Court on every point (— F. 2d — [2 Cir. 1959], Pet. Appdx. I, 1a-9a, rehearing — F. 2d — [2 Cir. 1959], Pet. Appdx. IV, 35a-36a).

We respectfully refer this Court to the two opinions below, for an accurate summary of the facts and law applicable to this case, both of which are ignored and completely disregarded in the Petition for Certiorari.

POINT I

The judgment below was entered upon undisputed documentary evidence.

Although the Petition throughout insists that Petitioners have been deprived of their "day in court" in this equity case; and although Petitioners claim that: "Every material fact in the trustee's account and in the trustee's self-serving affidavits was directly con-

troverted by Petitioners' objections to the . . . account and by Petitioners' affidavits" (Pet. p. 7); the fact is that the judgment below was based entirely upon *undisputed documentary evidence.*

Below, the Petitioners admitted that all issues but one in their original complaint were rendered moot by the Texas judgment (A. 214a-215a).* They admitted, further (A. 216a) that:

> ". . . *the sole and only questions* undetermined under the Complaint and Supplemental Complaint are (a) the settlement of the account of the Defendant Kerlin, as Trustee (whether as express or constructive trustee is irrelevant), and (b) a determination of Kerlin's liability, if any, under Plaintiffs' Supplemental Complaint." (Italics by Petitioners.)

Petitioners' objections to Respondent's account (A. 105a-109a) were overruled, Judge Ryan saying (Pet. Appdx. II, 14a):

> "I take up first the objections to the account. These may be disposed of without a hearing as they can be determined only by reference to the documents and exhibits submitted, none of which are in dispute."

The documentary evidence upon which Judge Ryan acted in granting that summary judgment consisted of:

(a) The Court Record in this action;

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* References to Petitioners' Appendix below are designated "A.", with the appropriate page numbers. References to Respondent's Appendix below are designated "AA.", with the appropriate page numbers.

(b) A copy of the judgment in the Government's condemnation suit in the Texas Federal District Court, which revested title to the Padre Island land in the Respondent (Exhibit C to Petitioners' Complaint), (AA. 236a-246a);

(c) The opinion of the Texas Court of Civil Appeals in *Fisher* v. *Kerlin*, 279 S. W. 2d 637 (1955);

(d) Certified copies of the Texas judgment (AA. 13a-45a) fixing the extent of the Petitioners' rights under their written quitclaim deed to the Respondent, Kerlin (A. 18a-27a);

(e) Certified copies of two written oil and gas leases, filed of record in Texas (AA. 117a-154a); and

(f) Other undisputed documents set out in Respondent's affidavits in support of the motion (see Appdx. II, 14a).

As to all of the foregoing, there was and could be no dispute or any substantial controversy. And this documentary material, was and is, as available to the Petitioners as to the Respondent. After the respective rights of the parties under the quitclaim deed had been determined by the Texas judgment, the present action presented a comparatively simple accounting problem, easily determined from the documents, as both courts below have found and determined.

As for Petitioners' Supplemental Complaint, filed in this action after entry of the Texas judgment, in a desperate effort, *somehow*, to keep this litigation alive, it was plainly without merit, in fact or law, as the courts below have also determined.

In those four Supplemental Counts, based on the bringing of the Texas action by Respondent, Petitioners sought to charge Respondent with breach of an alleged trust, a conspiracy to breach the alleged trust, malicious prosecution, and slander of Petitioners' title to the Texas lands. And, the relief sought, was recovery of Petitioners' attorney's fees, interest, and general, special and punitive damages in amounts not specified.

Being without merit, of any sort, in law or fact, those Supplemental Counts were properly dismissed.

POINT II

This petition, wholly without merit and frivolous, should be denied, with some appropriate admonition to petitioners, and with costs to respondent, including attorney's fees in all the courts.

Petitioners assert "that the American courts have all too often given the American public only *theoretical* justice, not *actual* justice" (Pet. 14).

And Petitioners contend, further, that certiorari should be granted here, because (Pet. 15):

> "The Court of Appeals has abused its power by deciding the principal issue of fact adversely to Petitioners *without any justification whatsoever in the record.*" (Italics by Petitioners.)

But Petitioners make no reference to the record to support this startling conclusion. Similarly without

record references, Petitioners assert (Pet. 17) that this case offers:

> ". . . the perfect illustration of an Appeals Court's opinion which is based upon 'facts' which never existed and issues of law which were never raised and upon 'admissions' which were never made by the litigants."

They state, further, that certiorari should be granted (Pet. 17-18):

> "Because it is the failure of the Courts of Appeals [referred to generally it seems] to grant litigants procedural due process of law in the sense here complained of which is the real reason for the breakdown in *actual* as distinguished from *theoretical* justice in this country." And that the granting of the writ prayed for will "be an electrifying improvement in *actual* as distinguished from *theoretical* justice in the U.S.A." (Italics by Petitioners; matter in brackets ours)

Although appearing here "*pro se*", the Petitioners are well able to employ counsel, and that they are persons of unreasonably extreme litigious proclivities, the following cases establish (*Humble Oil & Refining Co.* v. *Fisher, et al.*, 253 S. W. 2d 656 (Texas, 1953), cert. denied 345 U. S. 970; *Humble Oil & Refining Co.* v. *Atwood, et al.*, 244 S. W. 2d 637 (Texas, 1952); *Atwood* v. *Kleberg, Humble Oil & Refining Co., et al.*, 133 F. 2d 69 (5 Cir. 1943), sustained on rehearing, 135 F. 2d 452 (5 Cir. 1943), cert. denied, 320 U. S. 744; *Atwood* v. *Kleberg, et al.*, 163 F. 2d 108 (5 Cir. 1947), cert. denied 332 U. S. 843; *In re Joslyn*, 102 F. S. 521

(N. D. Ill. E. D., 1951), aff'd 198 F. 2d 673 (7 Cir. 1952), cert. denied, 345 U. S. 905; *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 449, 457, 86 N. E. 2d 367, 381-383 (1949), Appeal denied, 341 Ill. App. Appdx. XIV).

At some point, we respectfully submit, an end must be placed by our courts to unwarranted and baseless litigation. Otherwise their crowded calendars will continue clogged to the end of time—however hard the Judges may work and despite all admonitions that "the only justice is speedy justice".

As Honorable Sylvester J. Ryan stated in the District Court, two years ago (Pet. Appdx. II, 23a):

> "It is time this litigation come to an end."

It is respectfully suggested that the present application for certiorari presents an unusually good opportunity for this Court to establish a useful precedent, which in the future might discourage baseless litigation and appeals.

POINT III

The petition for certiorari should be denied, with such terms imposed as to this Court may seem just.

Dated: July 6, 1959

Respectfully submitted,

MacIlburne Van Voorhies
Counsel for Respondent.